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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
ORIGINAL

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
(Competitive Bidding))
)
)

PP Docket No. 93-253

To: The Commission

COMMENTS OF
PRIMOSPHERE LIMITED PARTNERSHIP

Primosphere Limited Partnership ("Primosphere"), by its attorneys, hereby submits its comments in response to the Commission's "Notice of Proposed Rule Making," released October 12, 1993, in the above-captioned proceeding (hereinafter "NPRM").

I. Introduction.

Primosphere is one of four remaining applicants for authorization to construct, launch and operate a satellite-based system in the Digital Audio Radio Service ("DARS"). Primosphere is limiting the scope of these comments to the question whether the Satellite-DARS applicants should be subjected to auction procedures the Commission may adopt. Thus, Primosphere is not addressing herein the questions raised in Section III of the NPRM ("Auction Design").

As discussed below, Primosphere urges the Commission to exempt use of spectrum for Satellite-DARS from auction procedures on several legal and policy grounds. Satellite-DARS should not be subjected to auction procedures because: (1) the pending applications are not mutually exclusive, or are reasonably likely to become non-mutually exclusive; (2) the pending applications for

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Satellite-DARS spectrum have been "cut-off" and future applications are not contemplated; (3) Primosphere does not propose to receive compensation from users of its spectrum; and (4) the application of auction procedures to satellite services raises difficult international coordination issues.

In Section IV of the NPRM, the Commission asks for comments on the specific services "that should be included within or excluded from competition bidding." NPRM, para. 114. The Commission lists several services in this section but does not include Satellite-DARS. Perhaps Satellite-DARS was not discussed in the NPRM because the Commission has not yet completed the formal allocation of spectrum for this new service.¹ However, the Commission last year established a "cut-off" date for Satellite-DARS applications,² and has "accepted for filing" the four pending applications.³ All of this took place prior to the enactment of the Omnibus Budget Reconciliation Act of 1993.

In the present proceeding the Commission proposes to limit auction proceedings to: (a) mutually exclusive applications; (b) initial license applications (not renewal or modification applications); and (c) radio communications services that principally use their spectrum to provide service to subscribers

¹ See Notice of Proposed Rule Making and Further Notice of Inquiry in Gen. Docket No. 90-357, 7 FCC Rcd 7776 (released November 6, 1992) (comments filed January 29, 1993; reply comments filed March 1, 1993; no decision yet).

² Report No. DS-1244, released October 13, 1992, "Digital Audio Radio Service Satellite System Application Acceptable for Filing/Cut-off Established for Additional Applications."

³ Public Notice, "Digital Audio Radio Service Satellite System Applications Acceptable for Filing," released February 19, 1993.

for compensation. Under these criteria, Satellite-DARS should not be subjected to the Commission's auction proceedings, and Primosphere asks that the Commission so specify in its Report and Order in this proceeding.

II. The Satellite-DARS Applications are Not Mutually Exclusive.

Although the four pending Satellite-DARS applicants are seeking initial authorizations, they may not be mutually exclusive. Primosphere believes that the four pending applications are not mutually exclusive or, if they are, that they easily could become non-mutually exclusive by means of minor amendments submitted by one or two of the applicants. Primosphere is committed to submitting such an amendment, if necessary, in order to make the four pending applications non-mutually exclusive. However, prior to doing so Primosphere asks that the Commission make clear that if the four pending Satellite-DARS applications are not mutually exclusive they will not be subject to the Commission's auction procedures.

In paragraph 156 of the NPRM, in discussing "Mobile Satellite Service (MSS) Below 1 GHz," the Commission appears to agree with Primosphere's premise herein that when all applicants in a service "do not appear to be mutually exclusive," the authorization(s) for that service will not be awarded through auction. The Commission states that in the Non-Voice, Non-Geo-Stationary ("NVNG") service the current applications "do not appear to be mutually exclusive," but "it is possible that mutually exclusive applications may be filed in the future." Therefore, the Commission concludes that if mutually exclusive applications are filed in the future, "we

propose to subject the NVNG service to competitive bidding." In the case of Satellite-DARS, there is no opportunity for future applications because of the "cut-off" status of the four pending applications; so the Commission can and should specify that the four pending, "cut-off" Satellite-DARS applications are not subject to the auction procedures if they are not mutually-exclusive.

III. Spectrum to be Utilized by Primosphere is Exempt from the Auction Procedures Because Primosphere will not Receive Compensation from the Users of its Services.

In addition to the likely lack of mutual exclusivity of Satellite-DARS applicants, the spectrum proposed for use by Primosphere cannot be subject to auction procedures because Primosphere will not receive compensation from the users of its services. Primosphere proposes to provide satellite digital audio radio service on a free, broadcast-like basis, so its use of the spectrum falls outside of the scope of applicability of auctions as provided for in the Omnibus Budget Reconciliation Act of 1993.

Two of the other Satellite-DARS applicants currently propose subscription services only, but there is nothing preventing them from amending their proposals to provide some or even entirely non-subscription services, either before grant or after grant. Thus, because no determination can be made now that Satellite-DARS will be used principally to provide service to subscribers for compensation, the Commission should specify that Satellite-DARS will not be included among those services for which mutually-exclusive applicants will be selected/eliminated by auction.

In the NPRM, at paragraphs 30-33, the Commission considers how to determine whether the principal use of a service will be "the

transmission or reception of communications signals to subscribers for compensation." The Commission posits (at paragraph 31):

Although, in theory, we could examine individual applications to determine their principal use, this would be virtually unworkable because of the heavy administrative burden such determinations would place on the Commission. We seek comment on our proposal.

In the Satellite-DARS situation there would be no such burden. There are only four applications (all in "cut-off" status, so no additional applications may be filed), and Primosphere, without question, proposes entirely a "free," non-subscription service. Primosphere would be willing to accept a condition in its Satellite-DARS authorization limiting its uses to non-subscription services. Thus, in the case of Satellite-DARS, the Commission could determine easily that at least one of the pending applications is not subject to auction because it proposes only non-subscription services, but that the others, because they propose all (or nearly all) subscription services, are subject to auction. In the alternative, any Satellite-DARS application proposing entirely or primarily non-subscription services could be deemed a "subset of services" (as described in NPRM para. 32), not subject to auction; and those that propose all or predominantly subscription services would be a subset which is subject to auction.

IV. Auction Procedures Should Not Be Applied to Satellite Services.

Even if the Commission determines that the auction procedures authorized in the Budget Reconciliation Act of 1993 may be applied to Satellite-DARS, the Commission should not utilize such

procedures to license the use of spectrum for any satellite services. All communication satellite systems are subject to international coordination processes through the International Telecommunication Union. This is required because satellite emissions do not stop at national borders, no matter how precisely the satellite footprint is defined. This process sets in motion technical coordination among countries that may be affected by the proposed system.

Within the international regulatory environment, the United States has consistently maintained that neither spectrum nor orbital locations used by the satellites of individual nations or multi-administration organizations have intrinsic economic value. The United States, in taking this position, has opposed the territorial claims of some countries concerning the use of the geostationary satellite orbits above their countries. To apply the use of auctions to the use of spectrum for satellite systems runs counter to this long-held United States position which has enabled the implementation of numerous satellite systems providing a variety of important telecommunications services.

The U.S. Satellite-DARS systems will require coordination with Mexico, Canada and possibly other administrations. In entering such technical coordinations, it is in the interest of the United States to maintain its traditional focus on technical, rather than economic or political issues. Licensing Satellite-DARS systems without auction procedures will aid the United States in maintaining this focus.

IV. Conclusion.

For the above-described important legal and policy reasons, Primosphere urges the Commission not to utilize auction procedures for the issuing of licenses for Satellite-DARS. Primosphere asks that the Commission, in this proceeding, specify that the Satellite-DARS service is not subject to whatever competitive bidding procedures the Commission adopts; or, in the alternative, that a Satellite-DARS applicant who does not propose to charge subscribers -- i.e., one that proposes a free, broadcast-like service -- is not subject to such procedures.

Respectfully submitted,

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